Supreme Court, U. S.
FILED
OCT 22 1979
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1979

NO. 79-654

FRANK J. MERLINO,
Petitioner,

versus

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RICHARD M. GALE
924 Biscayne Building
19 West Flagler Street
Miami, Florida 33130

Attorney for Petitioner

A B Letter Service, Inc., 327 Chartres St., New Orleans, La. (504) 581-5555

INDEX

PAGE

Opinion Below 1

Jurisdiction 2

Questions Presented 2

Constitutional Provisions 3

Statutory Provisions 4

Federal Rule of Appellate Procedure 4

Statement of the Case 5

Reasons for Granting the Writ 11

Conclusion 20

Certificate of Service 21

Appendix A - Opinion of Fifth Circuit A-1

Appendix B - Denial of (first) Petition for Rehearing A-12

Appendix C - Order of Fifth Circuit granting leave to file Second Petition for rehearing and rehearing en banc A-14

Appendix D - Notice of order denying second petition for rehearing or rehearing en banc A-15

TABLE OF CASES

PAGE

Berger v. United States,
295 U.S. 78-88, 55 S.Ct. 629, 79 L.Ed. 1314 (1934) 12,14

Caldwell v. United States,
92 App. DC 355, 205 F.2d 879. 16

Communist Party of the United States v. Subversive Activities Control Board,
351 U.S. 115, 124, 76 S.Ct. 663, 668, 100 L.Ed. 1003(1955)12

Coplon v. United States,
89 App. DC 103, 191 F.2d 749. 16

Glasser v. United States,
315 U.S. 60, 76, 62 S.Ct. 457, 467, 86 L.Ed. 680 (1942). . . .17

Hampton v. United States,
425 U.S. 484, 96 S.Ct. 1646, 48 L.Ed.2d 113 (1976). 14

Hoffa v. United States,
385 U.S. 293, 306, 308 17 L.Ed.2d 374, 87 S.Ct. 408 16

McNabb v. United States,
318 U.S. 332, 339-400, 63 S.Ct. 608, 87 L.Ed. 819 (1943) . .11

Rochin v. California,
342 U.S. 165, 169-174 S.Ct. 205, 96 L.Ed. 908 (1964) 14

United States v. Banks,
383 F.Supp. 389, 392 (S.Dak. 1974) 11

United States v. Butler,
567 F.2d 885 (9th Cir. 1978) 11

TABLE OF CASES (continued)

PAGE

United States v. Hammond,
598 F.2d 1008 (5 Cir. 1979). 10,19

United States v. Levy,
577 F.2d 200 (3rd Cir. 1978) 18

United States v. Merlino,
595 F.2d 1016 (5th Cir. 1979) 1

United States v. Payner,
434 F.Supp. 113 (U.S., N.D. Ohio, E.D. 1977). 12

United States v. Reynolds,
345 U.S. 1, 12, 73 S.Ct. 528, 97 L.Ed. 727 (1952). 12,14

United States v. Russell,
411 U.S. 423, 431, 432, 93 S.Ct. 1637,
36 L.Ed.2d 366 (1973) 14

UNITED STATES CONSTITUTION

Fifth Amendment 3

Sixth Amendment. 3

UNITED STATES CODE

18 USC §3500(b) 4

21 USC §841(a) 4

28 USC §1254(1) 2

TABLE OF CASES (continued)

PAGE

FEDERAL RULES OF APPELLATE PROCEDURE

Rule 35 4

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1979

NO.

FRANK J. MERLINO,
Petitioner,

versus

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Petitioner, Frank J. Merlino, prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered on May 22, 1979.

OPINIONS BELOW

This case is reported at 595 F.2d 1016 (5 Cir. 1979). A copy of the Opinion is incorporated in the Appendix to this Petition (App., p. A-1).

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on May 22, 1979 (App., p. A-11). A timely petition for rehearing was denied (App., p. A-12). Subsequently, the Fifth Circuit entered an order allowing leave to the petitioner to file a second petition for rehearing and leave to file rehearing en banc (due to an apparent conflict in the Circuit's decisions) (App., p. A-14). The second petition for rehearing en banc was denied September 21, 1979 (App., p. A-15). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

QUESTIONS PRESENTED

I

Whether the Supreme Court should exercise its supervisory powers over the Federal courts to dismiss the indictment or order a new trial where the prosecutor (i) used a post-indictment grand jury to discover defense stratagem and prepare for trial; (ii) made false representations to the trial court that said grand jury was not used for any discovery and that no Brady material existed; (iii) withheld Brady and Giglio materials to throw the defendant off-balance; (iv) withheld one of the key witness' testimony before the indicting grand jury in violation of the Jencks Act and numerous trial orders.

II

Whether the Due Process clause of the Fifth Amendment will tolerate the prosecutorial

misconduct consisting of the acts described in Question 1, Items (i)-(iv).

III

Whether the defendant was deprived of his Sixth Amendment right to effective assistance of counsel where the government used a post-indictment grand jury to compel defendant's witnesses to disclose defense strategy and to prepare for trial.

IV

Where one panel of a circuit grants a new trial and another panel of the same circuit states it cannot grant a new trial when the defendant in each case declines an invitation to move for a mistrial but instead seeks dismissal of the indictment based on governmental misconduct (which constitutes a denial of Due Process or requires the Court to exercise its supervisory power) the Supreme Court should review based on the intra-circuit conflict and the importance of the issues or remand for a rehearing *En Banc* pursuant to Rule 35, Federal Rules of Appellate Procedure.

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment V:

> "No person shall . . . be deprived of life, liberty, or property, without due process of law . . ."

Amendment VI:

> In All criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense."

STATUTORY PROVISIONS INVOLVED

18 USC §3500(b):

> "After a witness called by the United States has testified on direct examination, the court shall on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified . . ."
>
> "(e) The term 'statement' . . . means - -
>
> * * * * *
>
> "(3) A statement, however taken or recorded, or a transcription thereof, if any, made by said witness to a grand jury."

21 USC §841(a):

> ". . . [I]t shall be unlawful for any person knowingly or intentionally -
>
> "(1) to . . . distribute . . . or possess with intent to . . . distribute . . . a controlled substance. . . "

FEDERAL RULE OF APPELLATE PROCEDURE INVOLVED

Rule 35:

> "(a) When Hearing or Rehearing in Banc Will Be Ordered. A majority of the circuit judges . . . may order . . . [a] proceeding be . . . reheard by the court of appeals in banc. Such . . . rehearing

> . . . ordinarily will not be ordered except (1) when consideration by the full court is necessary to secure or maintain uniformity of its decisions . . . "

STATEMENT OF THE CASE

This case involves the usual violations as to *Brady, Giglio,* and *Jencks* material by the prosecutorial arm of the United States government. Here, however, the prosecutor's zeal in the interminable and "anything goes" war against the alleged drug violator exceeded permissible limits. Prosecutorial misconduct is commonplace and will continue unless this Court exercises its judicial role as supervisor over the Federal Courts.[1]

Petitioner was charged with possession with intent to distribute and with distribution of 223.6 grams of cocaine, contrary to 21 USC §841(a)(1).

"Gross; improper use" of Grand Jury

The Fifth Circuit's decision reflects that after the petitioner was indicted the government subpoenaed a substantial number of witnesses to appear before a grand jury, which witnesses had been subpoenaed by the petitioner to testify at trial. The Fifth Circuit concedes that during the course of the

---

1. In the instant case, the United States Attorney for the Southern District of Florida was "invited" to the oral argument. He was asked whether the government attorneys would comply with the standing pre-trial discovery order in all criminal cases in his District.

grand jury proceedings one witness was asked by the [assistant] United States Attorney whether he had been interviewed by petitioner's counsel of record, and if so, what did he discuss with him. [2]

To compound the misuse of the grand jury, the prosecutor orally misrepresented to the trial court that the grand jury was not used for any discovery (R154, 155).[3]

In a written response opposing petitioner's motion to produce the post-indictment grand jury testimony, the govern-

---

2. From this post-indictment grand jury witness, the prosecutor ascertained that defense counsel's primary interest was the nature of the deal made with a paid government informant, Daniel Cacy, to get somebody arrested for the sale of cocaine (R 367, 371, 372). Armed with this information, the prosecutor was able to discover from a former state prosecutor, at the same grand jury, who nolle prossed three marijuana charges against Cacy that the nolle prosequi statement contained an entry that Cacy had assisted the "Feds" in a $700,000 cocaine buy in exchange for the case being dropped (R 375). Confronted with this highly favorable Giglio material, the prosecutor then advised the former assistant state attorney what he was "looking for" (R 368, 377). With the answers he was looking for from the state prosecutor, the federal prosecutor later used those answers effectively at trial to the prejudice of the petitioner as will be shown, *infra*.

3. Reference to Volumes I and II of the record-on-appeal containing the pleadings, orders, transcripts of certain pretrial hearings, etc., will be by the use of the symbol "R".

ment misrepresented to the district court as follows:

> ". . . the government can only respond that the Grand Jury was not used in the furtherance of any discovery and there was no misuse of the Grand Jury." (R 277)

The district judge found that the grand jury was improperly used to prepare a pending indictment for trial (R 284). As noted by the Fifth Circuit, the magistrate found that the government used the (post-indictment) grand jury to discover testimony of witnesses subpoenaed by the defendant.

The Fifth Circuit commented that the district judge (during the trial) described the incident of the prosecutor questioning one of the defendant's witnesses before the grand jury, on his conversations with defense counsel, as follows:

"Well, that's pretty gross. That's pretty gross; improper use."

Although the decision sought to be reviewed include the magistrate's finding that certain responses from the prosecutor's office were "false", the Fifth Circuit indicated that the prosecutor had been relying on statements made to him by other law enforcement officers which had been patently false.

Omitted from the decision is the finding of the magistrate after numerous appearances and filing of responses by the prosecutor that the latter has "made repeated representations to

the Court that have been false in this case . . ." (2 SR 21).[4]

Space limitations do not permit setting forth all of the governmental misrepresentations or a detailing of all the *Brady, Giglio* and *Jencks* material that was deliberately withheld by the government.[5]

Purposeful Brady Violations

One flagrant instance of deception by the government as to the existence of *Brady* material, and described in a magistrate's order as "not . . . praiseworthy", was the representation that petitioner was not mentioned on certain telephone tapes of one Dan Cacy, a paid government informant (R 87, 88, 155, 193).

A flagrant instance of prosecutorial supression was the failure of the government to give special agent, Fernandez' two-page report containing exculpatory evidence to the petitioner (T 642-647, 651-652).[6] The district court found the first page

---

4. Reference to the Second Supplement to the record-on-appeal will be by the use of the sumbol "2 SR".

5. In this respect the Fifth Circuit stated that the record discloses that there was some Brady material and some Jencks material withheld by the government until long after it should have been given to the defendant.

6. Reference to the transcript of the trial proceedings contained in Volumes III and IV of the record-on-appeal will be by the use of the symbol "T".

to be helpful to the defendant where the agent attempted to get petitioner into a drug deal, and the petitioner indicated he was not interested (T 642-647, 651, 652). The prosecutor told the court that he could not give an answer as to why Fernandiz' report was not furnished to the petitioner (T 651).

Giglio Violations

The prosecutor suppressed the fact that Cacy was led to believe that for his cooperation the government would not prosecute him for bringing 1,400 pounds of marijuana to Miami (T 477, 478). Also, the prosecutor, after misusing the post-indictment grand jury, did not advise the petitioner that the nolle prosequi statement on Cacy had an entry that the latter had assisted the "Feds" in a $700,000 cocaine buy in exchange for his cases being dropped (R 375).

The Jencks Violation

At first the government represented to the district judge that it had no record of Agent Fernandez testifying before the grand jury (T 614-618, 675, 682, 945-948). When confronted with the fact of Fernandez testifying before the grand jury the government stated that it was unable to find any transcript of the testimony.

On appeal the government contended that it did not have to produce that which it did not have in its possession (the untranscribed shorthand notes) which the Fifth Circuit described as "nothing short of ridiculous". As soon as the

government realized a reversal was imminent if Fernandez' testimony before the grand jury was not transcribed and produced, the government (after disobeying pre-trial and trial orders to produce the transcript) suddenly delivered the transcript to the Fifth Circuit approximately ten days prior to oral argument.

From all of the foregoing, the trial judge's finding ". . . the defense has well had the problem of not having the full information necessary to prepare its case and conduct its trial . . . " is an understatement (T 665, 666).

In any event, the trial judge placed the petitioner in his own words "between a rock and a hard place" by stating the petitioner could ask for a mistrial but would not indicate that he was going to grant one (T 665, 666).

The Fifth Circuit seized upon petitioner's election not to ask for a mistrial, and instead to stand on his motion for dismissal of the indictment, as precluding petitioner from the alternative of a grant of a new trial.

Subsequent to the Merlino decision the Fifth Circuit in the case of *United States v. Hammond*, 598 F.2d 1008 (5 Cir. 1979), held (according to Judge Vance's dissent) in a "non-narcotics" case that a defendant can be entitled to a new trial based on governmental misconduct when he declines an invitation to move for a mistrial and elects to stand on his motion to dismiss the indictment.

Based on the apparent intra-circuit conflict, the Fifth Circuit granted leave to petitioner to file a second petition for rehearing and rehearing in banc and thereafter denied same (App., p. A-15).

REASONS FOR GRANTING THE WRIT

> This Court should exercise its suprevisory powers to dismiss the indictment or grant a new trial where justice is perverted by government prosecutors misusing a grand jury, lying to cover up this misconduct and misrepresenting that *Brady*, *Giglio* and *Jencks* material did not exist as well as suppressing same.

This Court stated in *McNabb v. United States*, 318 U.S. 332, 339-400, 63 S.Ct. 608, 87 L.Ed. 819 (1943), as follows:

> "Judicial supervision of the administration of criminal justice in the Federal courts implies the duty of establishing and maintaining civilized standards of procedure and evidence. Such standards are not satisfied merely by observance of those minimal historic safeguards for securing trial by reason which are summarized as 'due process of law' and below which we reach what is really trial by force."

Supervisory power over the administration of justice should be invoked to dismiss an indictment or grant a new trial where the prosecution's intolerable misconduct has permeated the proceedings. See *United States v. Butler*, 567 F.2d 885 (9th Cir. 1978) (concurring opinion); *United States v. Banks*, 383

F.Supp. 389, 392 (S.Dak., 1974); cf., *Communist Party of the United States v. Subversive Activities Control Board,* 351 U.S. 115, 124, 76 S.Ct. 663, 668, 100 L.Ed. 1003 (1955); *United States v. Payner,* 434 F.Supp. 113 (U.S., N.D. Ohio, E.D. 1977). [7]

The government, and particularly the United States Attorney's Office, is charged not only with the duty to prosecute the accused, but also with the paramount duty to ensure that justice is done. *United States v. Reynolds,* 345 U.S. 1, 12, 73 S.Ct. 528, 97 L.Ed. 727 (1952); *Berger v. United States,* 295 U.S. 78-88, 55 S.Ct. 629, 79 L.Ed. 1314 (1934).

Here, the federal prosecutor used ("innocently") during pre-trial proceedings "patently false " statements of law enforcement officers to thwart the process of the court (595 F.2d 1017).

Here, the prosecutor falsely represented to the court that the post-indictment grand jury was not used for discovery (R 154-156).

Here, the prosecutor went further by falsely responding, in opposition to a defense motion seeking the post-indictment grand jury testimony, that the grand jury was not used in furtherance of any discovery and that there was no misuse of the grand jury (R 277).

---

7. This court has granted review in *United States v. Payner, supra.*

Here, the prosecutor subpoenaed defendant's witnesses to ascertain what defense counsel was seeking and to prepare for trial (595 F.2d 1018; R 367, 368, 371, 372, 375, 377).

Here, there were repeated *Brady, Giglio* and *Jencks* violations both before and during trial as illustrated in the Statement of the Case, *supra,* which kept the defense "off balance" (595 F.2d 1018).

Here, the tragedy is the degree to which the government carried its offensive conduct and the district court turned its head. Then, in turn, the Fifth Circuit turned away from the obvious, egregious prosecutorial misconduct by holding a motion for mistrial should have been made by the petitioner.

If the Court cannot see the importance of exercising its supervisory powers to substantially upgrade the prosecutor's role in federal criminal proceedings, the Court will, in effect, be declaring that in the administration of criminal justice the end justifies the means.

II

Review must be granted for due process will not tolerate the perversion of justice by government prosecutors misusing a grand jury, lying to cover up this misconduct and misrepresenting that *Brady, Giglio* and *Jencks* material did not exist as well as suppressing same.

Again, as stated under Point I, the government, and particularly the United States Attorney's office, is charged not only with the duty to prosecute the accused, but also with the paramount duty to ensure that justice is done. *United States v. Reynolds, supra; Berger v. United States, supra.*

No citation of authority is necessary to support the principle long recognized by this Court that all criminal prosecutions must meet the bare minimum standards of Due Process of Law.

Quite simply, the prosecutorial misconduct depicted in the Statement of the Case (although helpful to gain a conviction) obviously shocks the conscience and is so outrageous that due process principles should bar conviction or compel the granting of a new trial. Cf., *Rochin v. California*, 342 U.S. 165, 169-174, 72 S.Ct. 205, 96 L.Ed. 908 (1964); *United States v. Russell*, 411 U.S. 423, 431, 432, 93 S.Ct. 1637, 36 L.Ed.2d 366 (1973); *Hampton v. United States*, 425 U.S. 484, 96 S.Ct. 1646, 48 L.Ed.2d 113 (1976).

Although *Rochin, Russel* and *Hampton* delt with police misconduct, it is submitted the Court should determine that the degree and type of misconduct to offend due process concepts would be even less where prosecutorial misconduct is involved. See *United States v. Reynolds, supra; Berger v. United States, supra.*

Further, the prosecutorial misconduct hampered petitioner's counsel by throwing his counsel "off balance" through the suppression of *Brady, Giglio* and *Jencks* material. (595 F.2d 1018).

Actual prejudice resulted to the petitioner from the prosecutor misusing the post-indictment grand jury to determine the petitioner's strategy by asking one of petitioner's subpoenaed witnesses what he discussed with petitioner's defense counsel. [8] Then, after determining that defense counsel's primary interest was the substance of the deal made with the paid informant, Cacy, the federal prosecutor interrogated petitioner's subpoenaed key witness on the Cacy deal before the same grand jury.

Thereafter, during cross-examination at trial, the federal prosecutor, supplied with the answers he told this latter witness he was "looking for" during the illicit grand jury interrogation, had no difficulty in eliciting the the "desired" answers from the witness (R 375-377). These answers diluted to petitioner's prejudice the importance of Cacy's work for the DEA, and that agency's help in assisting the informant, an oft-convicted felon, to be discharged from three state felony offenses in Florida (T 905-908).

Accordingly, the egregious conduct of the prosecutor, permeating both the pretrial and trial proceedings should be subject to appropriate correction by the Court via the Due Process Clause (or use of the Court's supervisory powers).

---

8. See fn. 2, *supra.*

III

> Petitioner was deprived of his Sixth Amendment Right to effective assistance of counsel where the government improperly used a post-indictment grand jury to compel defendant's witnesses to disclose defense strategy and to prepare for trial.

This Court in *Hoffa v. United States,* 385 U.S. 293, 306-308, 17 L.Ed.2d 374, 87 S.Ct. 408, has recognized the proposition that a surreptitious invasion by government agents into the legal camp of the defense may violate the protection of the Sixth Amendment as expressed in *Caldwell v. United States,* 92 App. DC 355, 205, F.2d 879 and *Coplon v. United States,* 89 App DC 103, 191 F.2d 749.

The misuse of a post-indictment grand jury by a federal prosecutor to subpoena petitioner's witnesses for the purpose of ascertaining defense strategy and to prepare for trial constitutes a gross intrusion upon the petitioner's right to effective assistance of counsel under the Sixth Amendment, for the intrusion is committed under color of governmental authority.

By this governmental misconduct, the prosecutor was able to ascertain as indicated in Point II, *supra,* the petitioner's stratagem in regard to a paid government informant, who was to testify against petitioner.

Armed with the knowledge that the petitioner's strategy would be to concentrate on the credibility of Cacy as to the

type of deal made for his work for the DEA, the prosecutor interrogated another witness (a former state prosecutor), before the same post-indictment grand jury and stated to this witness "my question is more - - let me explain what I am looking for." (R 368, 377).

From the answers elicited, the federal prosecutor was able to cross-examine the state prosecutor during trial and to elicit the favorable portions of his grand jury testimony (T 905-908). [9]

Where there is a Sixth Amendment violation of a defendant's right to effective assistance of counsel, the remedy should be dismissal of the indictment or at the least, the granting of a new trial. Furthermore, it is unnecessary to find any prejudice where the Sixth Amendment right to effective assistance of counsel is violated, for as held by this Court in *Glasser v. United States,* 315 U.S. 60, 76, 62 S.Ct. 457, 467, 86 L.Ed. 680 (1942):

> "The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial."

This Court should review the Sixth Amendment violation

---

9. The Sixth Amendment violation by the government was further compounded by the prosecutor stating to the jury in final argument that there wasn't any real help to Cacy by the DEA on the State felony charges (T 971).

by the government through its wilful and knowing invasion of the attorney-client relationship by misuse of a grand jury. It was ably stated in *United States v. Levy*, 577 F.2d 200 (3rd Cir. 1978):

> " . . . [W]here confidential information is disclosed to the government, we think, that there are overwhelming considerations militating against the standard which test the sixth amendment violation by weighing how prejudicial to the defense the disclosure is . . . [I]t is highly unlikely that a court can, in such a hearing, arrive at a certain conclusion as to how the government's knowledge of any part of the defense strategy might benefit the government in its further investigation of the case, in the settled process of pretrial discussion with potential witnesses, in the selection of jurors or in the dynamics of trial itself."

It cannot be contradicted that the prosecutor's "gross; improper use" of the grand jury to ascertain defense strategy and to prepare for trial violated petitioner's Sixth Amendment right to effective assistance of counsel.

IV

> This Court should review based on the intra-circuit conflict and the importance of the issue, or remand for a rehearing en banc pursuant to Rule 35, Federal Rules of Appellate Procedure, where the panel in the case, *sub judice*, is in direct conflict with another panel on the issue of whether a defendant who declines an invitation to move for a mistrial but instead seeks dismissal of an indictment based on governmental misconduct can be entitled to the grant of a new trial.

In the case, *sub judice*, a drug case, the Fifth Circuit held that notwithstanding all of the occurrences of prosecutorial misconduct, inasmuch as the petitioner did not move for a mistrial when invited to by the trial court, and instead stood on his motion for a dismissal of the indictment, the appellate court has no alternative to grant a new trial. [10]

In a non-drug case, *United States v. Hammond*, 598 F.2d 1008 (5th Cir. 1979), another panel of the Fifth Circuit directly collided with the *Merlino* decision (as evidenced in the dissenting opinion) by holding a new trial may be granted based on governmental misconduct amounting to a denial of due process notwithstanding that the defendant declined an invitation to move for a mistrial and urged, instead, that the government's misconduct warranted a dismissal of the indictment.

Obviously, the two cases collide and this Court should decide the important question of federal law, not as yet settled by this Court as to whether or not a defendant must move for a mistrial where prosecutorial misconduct pollutes the judicial proceedings in order to be entitled to a new and fair trial.

---

10. Actually, the trial judge did not indicate if he would grant a mistrial (T 666). Following his conviction, the petitioner moved for a new trial based on prosecutorial misconduct, which motion was denied (R 447).

If the cirminal justice system is to survive serious and repeated acts of governmental misconduct, the federal courts should not place themselves in a judicial straight jacket by leaving no alternative except a dismissal of an indictment as was done in the case, *sub judice.*

In the event this Court does not grant review by way of certiorari, it is respectfully submitted that the case be remanded for an en banc hearing to compel the Fifth Circuit to comply with Rule 35 of the Federal Rules of Appellate Procedure in order that the court maintain uniformity of its decisions.

CONCLUSION

Based upon the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the Fifth Circuit.

Respectfully submitted,

Richard M. Gale
924 Biscayne Building
19 West Flagler Street
Miami, Florida 33130

_____
Attorney for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that three copies of the Petition for Writ of Certiorari were mailed, postage prepaid, to the United States Attorney's Office, 300 Ainsley Building, Miami, Florida, this 19th day of October, 1979.

_____
RICHARD M. GALE

APPENDIX A

OPINION OF THE FIFTH CIRCUIT

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 77-5708

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

FRANK J. MERLINO,
Defendant-Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

(MAY 22, 1979)

Before BROWN, Chief Judge, TUTTLE and THORNBERRY, Circuit Judges.

TUTTLE, Circuit Judge:

This appeal from a conviction on one count of possession of a controlled substance with intent to distribute and on another count for distribution of a controlled substance in vio-

lation of 21 U.S.C. § 841(a)(1) urges primarily prosecutorial misconduct as a basis for reversing. It also attacks consecutive sentences where it is alleged that the one act of distribution of a controlled substance will also support a sentence of possession with intent to distribute. Other errors are alleged which are of less importance in our consideration of the appeal.

I. STATEMENT OF THE CASE

There was ample evidence given by Agent Fernandez of the United States Drug Enforcement Administration from which the jury could readily find beyond a reasonable doubt that after some preliminary negotiations, Merlino delivered 223.6 grams of cocaine of 42.7 percent purity to Fernandez for $8,000. The testimony be Fernandez was supported by one Daniel Cacy, an unsavory character who, the jury could find, had originally tipped off the DEA to the possibility of making a case against Merlino in order to pay off for the state's dismissing a pending narcotics case against him in the state court. There can be no doubt but that the jury would have been hard put to it to believe anything testified to by Cacy if it had not been for the corroborating evidence of Fernandez and Surrounding circumstances.

The jury believed the government's witnesses and found Merlino guilty on both counts. It is clear that the only possession which the jury could find was the one act of possession which occured at the moment of sale to Fernandez.

II. PROSECUTORIAL MISCONDUCT

[1] Before, during, and after the trial, the defendant's

counsel filed no less than seven motions for dismissal of the indictment based on alleged prosecutorial misconduct. The appellant characterizes the failure of the prosecutor's office to produce certain *Brady* [1] material in response to an outstanding pre-trial order as "outrageous," "deceitful," "deliberate," "misleading" and highly prejudicial. Appellant uses the same pejorative allegations in his brief in this court, stating that such conduct, together with an alleged use of a grand jury proceedings for pre-trial preparation of its case, was so "outrageous" as to require the court in its supervisory capacity to dismiss the indictment. In this respect, the appellant is in the position of asking for a dismissal with no alternative of the grant of a new trial, because after substantially all of the occurrences of which he now complains, the trial court expressly placed upon the defendant a burden of deciding whether he wished to move for a mistrial. The defendant elected not to do so, standing on his motion for a dismissal of the indictment.

The record discloses that there was some *Brady* material and some *Jencks* material withheld by the government, until long after it should have been given to the defendant. As to this, the magistrate, who recommended that a motion for dismissal of the indictment be denied did find that certain responses from the prosecutor's office were "false." In this connection, the magistrate said during the hearing:

---

1. *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.ED 2d 215 (1963).

THE COURT: I realize that may not be your fault. I don't want to hear of the Government having done anything to thwart the process of the court. On the contrary, I want to know what the Government is doing, whether it is doing all in its power to assist the court in having its process honored. I don't know what more obligation we can do at this stage.

I am satisfied at this point, Mr. Pave, that you have not yourself, or anyone that you are aware of, thwarted the process. I am also concerned, however, that in the past in this case you have relied on statements made to you by other law enforcement officers, which had been patently false. You filed responses in this case stating there was no information favorable to Mr. Merlino concerning the *in camera* material. That was not true.

However, the magistrate exculpated the trial counsel by stating:

> I am satisfied that you didn't know that it was not true when you said it, but the point is that you have relied on some misrepresentations by other law enforcement officers that were not reliable, and I want to caution you and place upon you the burden to do some independent investigation, if it becomes necessary, in a given context and not to make representation based on what other people have told you. This is what I am telling you.

In her report to the court the magistrate said:

> Although the conduct of the government in its representations to the court concerning the nature of material ultimately examined *in camera* and required to be disclosed in this case has not been praiseworthy, it does not require dismissal of this indictment.

The trial court adopted the report and order of the magistrate.

Another basis for the appellant's charge of prosecutorial misconduct is the fact that after Merlino's indictment, and before trial, a substantial number of the witnesses who had been subpoenaed by the defendant to testify at the trial were subsequently subpoenaed by the government to appeal before a grand jury. It developed that during the course of the grand jury proceedings, one of the witnesses was asked by the U.S. attorney whether he had interviewed Mr. Masin (defendant's counsel of record) and if so, what did he discuss with him. As to this, the magistrate commented that: "There is every reason to believe that the government improperly used the grand jury of this court to discover testimony of witnesses subpoenaed by the defendant." Further, speaking to the questioning by the prosecutor of one of the defense witnesses before the grand jury on this conversations with defense counsel, the trial court said: "Well, that's pretty gross. That's pretty gross; improper use."

The difficulty with appellant's position here is twofold. In the first place, this court has held that in the case of even the most egregious prosecutorial misconduct, which the trial court

did not find here, the dismissal of an indictment in such a case must depend upon a showing of actual prejudice to the accused. Both the magistrate and the trial court concluded that no such prejudice had been established here. While it is evident that defense counsel was thrown off balance somewhat by the late production of materials in possession of the prosecution, a careful reading of the record convinces us that no actual prejudice occurred. In the second place, there can be no partial relief granted to the appellant by way of the grant of a new trial. This results from the fact that upon the express invitation of the trial court to make such a motion, the defendant declined to do so, standing firmly on his alleged right to have the indictment dismissed.

III. GRAND JURY TESTIMONY OF WITNESS FERNANDEZ

The appellant complains bitterly of the failure of the trial court to require the United States to produce the grand jury testimony of its principal witness Fernandez. The demand for this testimony created a real "tempest in a teapot." The government initially responded that it had no record of Fernandez having testitied before the grand jury. It stated that it had no recorded testimony of Fernandez. However, it was later discovered that the witness had testified before the grand jury but the government reported that it was unable to find a transcript of his testimony.

[2] In its brief before us, the government blandly takes the position that "the *Jencks* Act does not require the government to produce that which it does not have in its possession," citing *United States v. Trevino*, 556 F.2d 1265, 1271 (5th Cir.

1977). The argument that when grand jury proceedings have been recorded but not transcribed, the government does not have them in its possession is nothing short of ridiculous. Certainly, if an FBI agent should testify as a witness against a defendant in a criminal prosecution, and the latter demands any written statements made by him relating "to the subject matter of the testimony" the government can't refuse merely because the FBI's statement is in shorthand and has not been transposed in a manner to be read by others. That is precisely the situation which faced the court here and the court recognized it and ordered the transcript to be prepared and submitted to it. This, however, was not accomplished until after the trial was completed.

[3] The appellant does not argue that the failure of the trial court to examine it before the end of the trial would automatically entitle him to a new trial. He states:

> [I]f after an *in camera* examination, there is an arguable factual basis for concluding that some or all of said grand jury testimony related to the subject matter as to which the witness testified at the trial, then this Court should make available to all counsel such portions of that grand jury testimony, and the cause should be remanded to the District Court to conduct such further adversary hearing as appropriate, *United States v. Rivero*, 532 F.2d 450 (5th Cir. 1977).

Appellant's Brief, p.28. While the court followed that procedure in *Rivero*, it was necessary to do so because the transcript

of the grand jury testimony in that case was not before this Court. Here, however, the sealed document has now been opened and we have carefully compared it with Agent Fernandez' testimony at the trial and find that there is no "substantial inconsistency, contradiction or variation" in the testimony given on the two occasions. A copy of this unsealed testimony was also furnished to the appellant. We conclude that no prejudice has resulted to the defendant as a result of the trial court's failure to require the production of the document during the trial.

IV. THE INAUDIBLE TAPE

[4] During the course of the trial the government's principal witness Fernandez testitied to having recorded a conversation as to which he also testitied from the witness stand. The recorded tapes had been submitted to defense counsel long before trial. Some objections were made on the ground that part of the tapes were unintelligible. Thereafter, the government furnished defense counsel with a transcript which it reported had been prepared by Fernandez. Then at the trial, there was some discussion as to how much of the tapes were intelligible, whereupon the judge stated that he would listen to the transcript as it was played, that he would distribute the transcript to the jury but instruct them not to get ahead of what they might hear. The court stated that it would stop the recording and withdraw the transcripts in the event the tape was unintelligible. The court then expressly asked whether there was objection to the publishing of the tape and counsel responded: "No, Sir." Very shortly thereafter, it appeared that the recording was unintelligible and the trial court withdrew all of the transcripts. It then permitted the toral recording to

be completed but the quality was so poor that the court instructed the jury to disregard the tapes completely. We conclude that no prejudicial error resulted from the manner of handling this tape or the transcripts.

V. CHALLENGE TO THE JURY PANEL

[5] Two months following the conclusion of his trial, the appellant filed a motion to dismiss the indictment for failure to comply with the Jury Selection Act, Title 28 U.S.C. § 1863(b)(2)(4) and for failure to comply with Jury Selection and Service Act of 1960 as amended. The basis of the Complaint is that the jury before which he was tried was selected from names drawn from a 1973 master jury wheel. Under the statute, the Miami qualified wheel was refilled about two and one half months late, on September 9, 1977 whereas the jury in this case was empaneled on August 22, 1977.

The fatal difficulty with this contention is that the statute provides that:

> In criminal cases, before the voir dire examination begins, or within seven days after the defendant discovered or could have discovered, by the exercise of diligence, the grounds therefor, *whichever is earlier,* the defendant may move to dismiss the indictment or stay the proceedings against him, etc. (emphasis added)

Subsection (e) provides:

> The procedures prescribed by this section shall be the

exclusive means by which a person accused of a Federal crime, the Attorney General of the United States or a party in a civil case may challenge on the ground that such jury was not selected in conformity with the provisions of this title.

This Court has applied this standard in all its strictness in *United States v. DeAlba-Conrado*, 481 F.2d 1266 (5th Cir. 1973) and in *United States v. Kennedy*, 548 F.2d 608 (5th Cir. 1977). In the latter case, this Court said:

> The courts have strictly enforced both the timeliness and sworn statement requirements of § 1867. This court has refused to consider a statutory challenge raised after the empanelling of a jury. *See United States v. De Alba-Conrado*, 481 F.2d 1266 (5th Cir. 1973).
> 548 F.2d at 613.

VI. CONSECUTIVE SENTENCES

[6] Merlino was indicted under an indictment in two counts, the first of which charged that he did "knowingly intentionally possess with intent to distribute a controlled substance . . ." in violation of Title 21, U.S.C. § 841(a)(1) and the second of which charged that he "did knowingly and intentionally distribute a controlled substance . . ." in violation of Title 21, U.S.C. 841(a)(1).

The relevant Code section provides:

841. Prohibited Acts - Unlawful Acts.

(a) Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally -

(1) to . . . distribute . . or possess with intent to . . . distribute . . . a controlled substance . . ..

Thus, the indictment charges two separate crimes arising under a single subparagraph of § 841(a). It is also clear from the evidence in this case that Merlino's conviction of the two counts results form a single act, that is, the sale of approximately one-half pound of cocaine by Merlino to Fernandez, the DEA agent.

The determination of this case has been withheld pending the dicision of the Court en banc of *U.S.A. v. Hernandez*, 580 F.2d 188 (1978). *Hernandez* has now been decided by the en banc Court, *U.S.A. v. Hernandez*, 591 F.2d 1019 (1979). It controls the decision here. The evidence of the sale was relied upon to prove both Merlino's constructive possession of the cocaine and his intention to distribute it. Both sentences cannot stand.

VII. CONCLUSION

We have given careful consideration to the appellant's criticism of the sentencing procedure and the other matters complained of and find that they do not merit discussion.

We affirm the judgment of conviction but remand the case to the trial court for sentencing.

AFFIRMED and REMANDED.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 77-5708

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

FRANK J. MERLINO,
Defendant-Appellant.

Appeal from the United States District Court for the
Southern District of Florida

ON PETITION FOR REHEARING
(July 30, 1979)

Filed: July 30, 1979

Before BROWN, Chief Judge, TUTTLE and THORNBERRY, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in

the above entitled and numbered cause be and the same is hereby DENIED.

ENTERED FOR THE COURT:

/s/ JOHN R. BROWN
CHIEF JUDGE

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 77-5708

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

FRANK J. MERLINO,
Defendant-Appellant.

Appeal from the United States District Court for the
Southern District of Florida

Filed: August 20, 1979

O R D E R:

IT IS ORDERED that appellant's motion for leave to file second petition for rehearing and leave to file rehearing en banc is GRANTED.

/s/ JOHN R. BROWN
CHIEF JUDGE

APPENDIX D

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT
OFFICE OF THE CLERK

September 21, 1979

TO ALL PARTIES LISTED BELOW:

NO. 77-5708 - U.S.A. v. MERLINO

Dear Counsel:

This is to advise that an order has this day been entered denying the petition ( ) for rehearing, and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16) the petition ( ) for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of mandate.

Very truly yours,

GILBERT F. GANUCHEAU, Clerk

By /s/ Sally Hayward
Deputy Clerk

cc: Mr. Richard M. Gale
Messrs. Michael A. Masin
Michael J. Rosen
Ms. Linda Collins Hertz